SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., C

In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-915

FRANCIS A. VITELLO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Francis A. Vitello, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on December 26, 1974.

Opinion Below

The opinion of the court below, printed in Appendix B hereto, *infra*, p. 18, is unpublished.

Jurisdiction

The judgment of the court below was entered on December 26, 1974, and rehearing denied on January 20, 1975. The judgment of the court below is printed in Appendix A hereto, *infra*, p. 17. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

I. Whether, in the trial of this single defendant conspiracy case, the admission of the highly prejudicial unsworn out-of-court statements of an alleged co-conspirator, who was not available as a witness at trial, without proper limiting instructions, violated the defendant's Sixth Amendment right of confrontation.

II. Whether, in the proper administration of criminal justice in the federal courts, the failure to give a proper limiting instruction concerning the admission of highly prejudicial hearsay statements of a witness unavailable to testify at the trial of a conspiracy case can be deemed to be harmless error in the absence of overwhelming independent evidence of the defendant's participation in the alleged conspiracy.

Constitutional Provisions Involved

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Statement of the Case

On April 13, 1974 a three count indictment was returned against the defendant (R. 1).[1]

Count I charges the defendant with a dual purpose conspiracy in violation of 18 U.S.C. § 371. It alleges that from on or about June, 1961 and continuously to April 13, 1973, the defendant together with Francis N. Rosenbaum, John W. Harris and Walter A. Lips, conspirators but not defendants, unlawfully, willfully, and knowingly conspired with each other to (a) defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of income taxes, and (b) commit the crime of filing false income tax returns for the calendar years 1966 and 1967. Thirteen overt acts were alleged (R. 4-9).

Count II charges the defendant with filing a false income tax return for the calendar year 1966 in violation of 26 U.S.C. § 7206(1). It alleges that the defendant reported on Schedule D of the return a longterm capital gain in the amount of $305,372.00 and attached to the return a seven-page schedule reflecting the purchase, sale and gain on foreign securities in such amount, whereas he well knew and believed that he and his wife did not during the calendar year 1966 have such gains. (R. 9)

Count III charges the defendant with filing a false income tax return for the calendar year 1967 in violation of 26 U.S.C. § 7206(1). It alleges that the defendant reported on Schedule D of the return a longterm capital gain in the amount of $504,758.72 and attached to the return a three-page schedule reflecting the sale, purchase and gain on foreign securities in such amount, whereas

[1] "R." refers to the Appendix to the Briefs in the Court of Appeals.

he well knew and believed that he and his wife did not during the calendar year 1967 have such gains. (R. 10)

The defendant pleaded not guilty.

At the trial, which commenced on February 25, 1974, there was evidence of the following:

John Harris, a friend of the defendant for more than thirty-five years, testified that he was employed by the Internal Revenue Service from 1950 through 1965. Sometime in 1959 the defendant asked Harris if he was familiar with the procedure for making a "voluntary disclosure" of unreported income. Harris told him that he was not, but that he would "look into it" (R. 339-353).

Harris thereafter made arrangements, through John McNicholas, a revenue agent with the Internal Revenue Service, for the defendant to meet with Frank L. Harney, who, it was thought, would be able to help the defendant in connection with a voluntary disclosure. Harney, after meeting with the defendant at the Bellevue Hotel in Boston, went to Washington, D.C. purportedly to speak to someone about a voluntary disclosure and upon his return reported to the defendant through Harris that he could not arrange a voluntary disclosure, but that he learned of some investment opportunities that might be of interest to the defendant. (R. 354-402).

A meeting in Washington, D.C. between the defendant and Douglas G. Mode, a Washington, D.C. attorney, was then arranged through Harney. At the meeting, Mode told the defendant that he was familiar with foreign investments and that if the defendant was interested in investing, he could handle it. The defendant said that he would consider it and let him know. Following the meeting, Harris and the defendant returned to Boston. (R. 447-461).

In November, 1960, the defendant and Harris vacationed in Europe for two weeks, visiting France, Italy and

Switzerland. While in Switzerland, the defendant opened a name account with the Union Bank of Switzerland and made a deposit. (R. 466-481).

Sometime after the defendant returned from his European trip, he telephoned Mode and made arrangements to meet him in Switzerland in June of 1961. (R. 482-485).

In June, 1961 the defendant and Harris met with Mode in a conference room at the Hotel Baur Au Lac in Switzerland. Also present was Dr. Walter A. Lips, manager of the Aarau Branch of the Union Bank of Switzerland, as well as two or three other gentlemen who Harris assumed were Swiss stockbrokers and bankers. The parties reviewed what appeared to be legal papers. (R. 490-495).

After the meeting the defendant told Harris that he had made some investments and that "he hoped they were good investments." Then the defendant and Harris went to the Union Bank of Switzerland and the defendant made a deposit for use in connection with his investments. (R. 499-505).

Later that day, Mode came to the defendant's room at the hotel, which he was sharing with Harris. The defendant and Mode sat at a card table and discussed Mode's fee. Before going to sleep, Harris observed three or four piles of bills three or four inches high with a fifty or one hundred dollar bill on the top of each. When he awoke Mode was still there but the money was gone. Harris assumed that the money was in the bag which Mode took with him. (R. 513-526).

Since Harris was not feeling well, he returned with the defendant to the United States the following day. (R. 544).

Over the following year, Mode transmitted from Washington, D.C. to Burgert in Switzerland, on three separate occasions, three of the defendant's checks payable to Burgert's company in the total amount of $105,000. (R. 315).

In March, 1964 the defendant told Harris that his money

had been stolen from the Union Bank of Switzerland. The defendant went to Switzerland and when he returned, he told Harris that he learned that someone had impersonated him and withdrawn his money. (R. 555-563).

The defendant then called Mode and accused him of taking his money and told him "that he was going to bring suit if he didn't get satisfaction." (R. 565-566).

Thereafter, the defendant retained Lawrence O'Donnell, a Boston attorney, who referred the defendant to Francis McLaughlin, a Washington, D.C. attorney. (R. 569-571).

It was ultimately determined that one Francis Rosenbaum had stolen the defendant's money. (R. 580-590).

The government's case depended principally upon the testimony of Francis N. Rosenbaum who at the time of trial was serving a ten year jail sentence[2] for perjury, conspiracy to defraud the United States and submitting false material statements, all of which crimes were unrelated to this indictment or the defendant. In this case, Rosenbaum was named as a conspirator, but not as a defendant.

Rosenbaum testified that he was a lawyer with experience in international tax matters. He was a member of the Washington, D.C. law firm of Goodwin, Rosenbaum, Meacham and White, the same firm in which Mode had an office. He had had many "business dealings" with Lips and he knew Burgert, a customer of Lips and owner and operator of a number of companies including Neotechnic Patent Corporation and Unitechnic Patent Corporation (R. 807-824).

Then, just prior to admitting into evidence Rosenbaum's testimony of his conversation with Lips, in the absence of the defendant, the court instructed the jury as follows:

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[2] In January 1974, after testifying before the grand jury in this case, Rosenbaum was notified that his parole would be granted on March 28, 1974, approximately nine months before mandatory release (R. 1153-1154).

"Ordinarily conversations which take place outside of the courtroom are not admissible unless they are in the presence of the defendant. One of the exceptions occurs in conspiracy cases and permits the out-of-court conversations of co-conspirators to be admitted against the defendant. The two participants in the conversation inquired of are both named in the indictment as co-conspirators though they are not named as defendants.

Ordinarily, there must be a preliminary finding of the existence of a conspiracy, but that is subject to the practical rule that the Government has to start somewhere in proving its conspiracy. It can't be barred from proving its conspiracy because it can't start to prove its conspiracy until it has already proved the conspiracy. So you have to break into the circle at some point.

I am going to admit the testimony of this conversation conditionally. That is to say it will be admitted subject to the Government's obligation to prove that the participants in the conversation — to prove independently of this conversation that the participants in this conversation were members of the conspiracy. So I am going to let this in with a caution to you so that you will be alert and aware that that testimony was flagged in a way that it may be stricken later on. And even though you have heard it, with the instruction to discharge it from your mind, that, of course, is not an easy matter to do — once you have heard something to strike it from your mind.

That is why I have been very reluctant up to this point to admit evidence on a conditional basis even though I recognize that the Government has this circular problem in getting started in its proof.

So I urge you to listen to the evidence that you are

about to hear in a conditional frame of mind; that is to say, that you are going to hear it, but be prepared to disregard it later on if the circumstances are such that I order that it be stricken." (R. 828-830)

Immediately thereafter, counsel for the defendant asked the court to correct its instruction.

"Mr. Smith: I don't know whether your Honor misspoke yourself. I understood you to say that it would be admissible only when they found that there was a conspiracy between the two.

Now, I think that you ought to instruct them that it would not be admissible against the defendant until and unless they find that he is a part of that conspiracy." (R. 831)

Whereupon the court instructed the jury again as follows.

"The Court: Mr. Smith has called to my attention that I, perhaps, said to you that the conversation between Doctor Lips and Mr. Rosenbaum would only be admissible if there was evidence that there was a conspiracy between the two of them.

I meant to say, and I now say to you, that it would be admissible if it is found that they are part — that not only is there conspiracy between them, but they are part of the same conspiracy with which the defendant is charged in this case.

Let's get through this particular testimony on this particular conversation, since we have labored so heavily over it, and then we can close for the day." (R. 831)

Continuing, Rosenbaum testified, over the defendant's objection,[3] that in June, 1961 he met Lips in the United States at which time Lips solicited his advice on behalf of "Vitello" "on how to handle reporting for U.S. tax purposes, fictitious gains on a sum of approximately $1,200,000. in such a way that it would pass the scrutiny of the U.S. tax authorities." In response, Rosenbaum outlined a plan by which he thought this could be accomplished (R. 832-834).

Rosenbaum testified that in July, 1961 he had another conversation with Lips in which Lips asked him to explain to the defendant "what could be done with reference to the actual investment of the funds which were on deposit in his branch . . ." (R. 836).

In August, 1961 Rosenbaum met with the defendant in New York. He asked the defendant how he wanted to invest his funds on deposit in the Union Bank of Switzerland and the defendant said that "he did not wish to run any risks with the funds." (R. 836-839).

Rosenbaum further testified that he had conferences with Lips from time to time "over the period of the next year or two" regarding the defendant's affairs "in a sense that the repatriation about which (he) had advised him was going very slowly." (R. 840-841).

In 1964 Rosenbaum devised and executed a scheme in which he, with the help of one Tony Morales, caused approximately $850,000., the then balance in the defendant's account at the Union Bank in Switzerland to be transferred to the International Credit Bank in Geneva and there caused $700,000 to be withdrawn by Morales posing as the defendant. (R. 843-874). Rosenbaum's scheme was ultimately uncovered, and in April, 1964 Rosenbaum met with

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[3] Counsel for the defendant interposed a continuing objection to all conversations between Rosenbaum and Lips in the absence of the defendant. (R. 837).

the defendant, admitted what he had done, and worked out arrangements for the return of the defendant's funds (R. 876-879).

The money was eventually returned to the Union Bank of Switzerland by Rosenbaum pursuant to an agreement that had been worked out between the parties and their attorneys (R. 880-921).

Some time in the latter part of 1966 Rosenbaum had a meeting with the defendant and his attorney, Lawrence O'Donnell, at the latter's office. At that meeting, Rosenbaum said that he would not make any further contribution toward the defendant's expenses incurred in connection with the recovery of his money. "At that point," according to Rosenbaum, the defendant said to him that if he "was not going to contribute to this rather substantial expense for which (he) was responsible, that at least (he) should help him to get Dr. Lips and Dr. Burgert to do what they were supposed to do and repatriate his funds." (R. 963-965). Rosenbaum said that he recognized that he was responsible for the defendant's difficulties and that he would go to Switzerland and do his level best to get that done (R. 966).

Rosenbaum thereafter met twice with Lips in Switzerland and worked out an elaborate scheme whereby they prepared schedules showing fictitious capital gains on the sale of foreign securities (R. 968-985).

According to Rosenbaum, after completing the second set of schedules in Switzerland he returned to the United States and told the defendant by telephone that "this had been done and he would shortly receive the schedules and this would take care of the balance of the funds." (R. 986).

Rosenbaum identified the schedule attached to the defendant's 1966 tax return (government's Ex. 5) and the schedule attached to the defendant's 1967 tax return (gov-

ernment's Ex. 6) as being those which he and Lips prepared (R. 971-980).

On March 12, 1974, the jury returned a verdict of guilty on all three counts. (R. 3).

Defendant seasonably filed a motion for judgment of acquittal notwithstanding the verdict, which the court denied (R. 1267).

On April 5, 1974 the court sentenced the defendant to be imprisoned for three years on Count I with a fine of $10,000., three years on Count II with a fine of $5,000. and three years on Count III with a fine of $5,000. The sentences imposed on counts II and III are to run concurrently with the sentence imposed on Count I. The government's motion for costs of prosecution was allowed. Execution of sentence was stayed and the defendant was admitted to bail pending appeal. (R. 1278).

Defendant seasonably filed notice of his appeal to the court below (R. 4).

The court below affirmed the judgment of the District Court, holding that there was no reversible error, even though the trial judge's limiting instruction was incomplete, because: (1) the instruction "was correct so far as it went and was consistent with defense counsel's immediate request"; (2) "in no case has this circuit reversed for failure to give a complete cautionary instruction early in the trial"; and (3) "there was ample independent evidence tying the defendant into the conspiracy."

Reasons For Granting the Writ

The petitioner does not challenge the constitutionality of the federal co-conspirator exception to the hearsay rule. Rather, he makes the narrow contention that the trial judge failed to correctly apply the rule in that he permitted the unsworn out-of-court declaration of one Lips, an alleged

co-conspirator, who was not available as a witness at trial,[4] to be admitted into evidence through one Rosenbaum, another alleged co-conspirator, without proper limiting instructions. *Lutwak* v. *United States,* 344 U.S. 604, 618-619 (1953). As a result, the defendant was effectively denied an opportunity to confront and cross-examine Lips, an alleged co-conspirator whose damaging statements had been used against him.

Here, just prior to admitting into evidence, over the defendant's objection, Rosenbaum's testimony of his conversation with Lips, in the absence of the defendant, the trial judge told the jury that the conversation was going to be admitted "subject to the Government's obligation . . . to prove independently of this conversation that the participants in this conversation were members of the conspiracy." Defense counsel immediately asked the trial judge to correct his instruction by telling the jury that the hearsay conversations "would not be admissible against the defendant until and unless they find that (the defendant) is a part of that conspiracy." But instead the trial judge then instructed the jury that "it would be admissible if it found that *they* (Rosenbaum and Lips) are part — that not only is there a conspiracy between *them,* but *they* are part of the same conspiracy with which the defendant is charged in this case.

Contrary to the finding of the Court of Appeals, *United States* v. *Vitello,* slip op. No. 74-1137 at 6 (1st Cir. December 26, 1974), the defendant submits that the instruction given by the trial judge was neither correct nor consistent with defense counsel's immediate request.[5]

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[4] Although Lips is a Swiss national, there is nothing in the record to show that he was unavailable as a government witness. See *Schumacher* v. *United States,* 216 F.2d 780, 787-788 (8th Cir. 1954). Indeed, the government conceded that no official effort was made to secure his attendance at trial (R. 1242).

[5] At the conclusion of the trial the court accurately instructed the jury on the role of hearsay in a conspiracy case as follows:

In *Lutwak* v. *United States,* 344 U.S. 604 (1953), this Court stated at pp. 618-619:

> "In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. *These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them.*" (Emphasis supplied.)

In *United States* v. *Apollo,* 476 F.2d 156 (5th Cir. 1973), the Court noted at p. 163:

"If you conclude that such a conspiracy did exist, you must next determine whether or not the defendant was a party to or a member of that conspiracy with knowledge of its illegality and with the specific intention to assist the conspiracy to its illegal objects. In making this determination, you should consider only the evidence of the defendant's acts and statements.

"If and only when the existence of the conspiracy charged in the indictment has been found by you, and the defendant has been found to be a member of the conspiracy solely on the basis of testimony and evidence as to his own statements or declarations or acts or conduct, then the acts done and the statements or declarations made by any other person found by you to be a member of the conspiracy may be considered as evidence in the case against the defendant, even though such acts and declarations may have been made in the absence of and without the knowledge of the defendant, provided such acts were done and such statements or declarations were made during the continuance of the conspiracy and in furtherance of the objectives or purposes of the conspiracy." (R. 1264)

The defendant submits, however, that this instruction came too late because, as the court pointed out in *United States* v. *Apollo,* 476 F.2d 156, 163 (5th Cir. 1973), "(t)his delicately dangerous defusing must be firmly in the jury's minds when the hearsay is proffered."

> "*Lutwak* established a minimum obligation on the trial judge in a conspiracy case in which extrajudicial statements ot alleged co-conspirators are proffered to give a cautionary instruction on the limited use of hearsay testimony, explaining clearly to the jury the requirement that the conspiracy itself and each defendant's participation in it must be established by independent non-hearsay evidence which must be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony."

Two days prior to the decision in this case, the First Circuit adopted the *Apollo* rule. *United States* v. *Honneus,* slip op. No. 74-1112 (1st Cir. December 24, 1974). And even in this case, the Court of Appeals stated: "We would emphasize, however, the desirability that trial judges give a full and precise limiting instruction early in the trial. The *Apollo* procedure should be followed, and failure to do so could, in appropriate cases, result in reversal."

In *Honneus,* before receiving the hearsay testimony the trial judge "instructed the jury that declarations affecting other alleged members of the conspiracy not present at the time the statements were made, were not to be considered against them unless the jury was satisfied that they were in fact members of the conspiracy." The Court of Appeals noted, however, that the trial judge failed to instruct, "as to the second aspect of this matter, that the existence of the conspiracy and defendant's participation therein had to be established by independent non-hearsay evidence before the jury could consider against defendant a conspirator's hearsay statement." The court then opined that "the limiting instructions that the (trial judge) did give initially is perhaps the more important of the two conditions. Cf. *Lutwak* v. *United States,* 344 U.S. 604, 618-619 (1953). The other, however, is of importance as well."

Here, the trial judge's failure to instruct the jury as to *either* condition, it is submitted, violated the defendant's Sixth Amendment right of confrontation. The defendant believes that a proper limiting instruction would have been the only safeguard to insure, as much as possible, that in determining whether the defendant was a knowing member of the conspiracy with which he was charged, the jury would not consider the unsworn out-of-court declarations of an alleged co-conspirator who was not subject to cross-examination. As this Court noted in *Lutwak* v. *United States,* supra, at 619: "even then, . . . the application of the rule places a heavy burden upon the jurors to keep in mind the admission of certain declarations and to whom they have been restricted and in some instances for what purposes." See *Bruton* v. *United States,* 391 U.S. 123 (1968); *Krulewitch* v. *United States,* 336 U.S. 440 (1949).

It is true that the failure of the trial judge to give a proper limiting instruction does not automatically require a reversal of the ensuing criminal conviction. In some cases the independent evidence of guilt is so overwhelming, and the prejudicial effect of the admission of the hearsay statements without proper limiting instructions is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the hearsay was harmless error.

Here, however, the independent evidence tying the defendant to the conspiracy, while considered "ample" by the Court of Appeals, was far from overwhelming. Moreover, as the Court of Appeals recognized, "it is evident that much of the (evidence) was developed through conversations between the co-conspirators at which time Vitello was not present." *United States* v. *Vitello,* infra at 22. "It is to be borne in mind that a jury has no experience in, or presumably knowledge of, the hearsay rule. Unguided, it would be most natural for the jury, in endeavoring to ascertain whether the (defendant was) in fact (a member) of the conspiracy, to consider all evidence that apparently bore

thereon." *United States* v. *Honneus*, supra at 18. It, therefore, follows that it cannot be said with even a minimal degree of certainty that the jury did not choose to disregard the "ample" independent evidence and base its verdict primarily upon the hearsay conversations between Rosenbaum and Lips. In other words, there is a reasonable possibility that the defendant was convicted on the basis of the unsworn out-of-court statements of an alleged co-conspirator in violation of his Sixth Amendment right of confrontation. See *Bruton* v. *United States*, 391 U.S. 123 (1968).

This possibility seems especially likely in view of the fact that the impact upon the jury of Rosenbaum's recitation of his conversations with Lips was, it is submitted, prejudicial by any standard.[6] Clearly, Lips' statements added substantial, if not critical, weight to the government's case in a form not subject to cross-examination, since Lips was not available to testify in court.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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[6] Rosenbaum testified that in June, 1961 Lips asked him, on behalf of "Vitello", "how to handle reporting for U.S. tax purposes, fictitious gains on a sum of approximately $1,200,000. in such a way that it would pass the scrutiny of the U.S. tax authorities." In response, Rosenbaum outlined a plan by which he thought this could be accomplished (R. 832-834).

Shortly after this testimony, court recessed for the day. The next day, the court admitted over the defendant's continuing objection and without any limiting instructions Rosenbaum's testimony of other highly prejudicial conversations in the absence of the defendant.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1137.

UNITED STATES OF AMERICA,
APPELLEE,

v.

FRANCIS A. VITELLO,
DEFENDANT, APPELLANT.

JUDGMENT
Entered December 26, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

[cc: Messrs. Peters and Alexander.]

APPENDIX B

NOT FOR PUBLICATION

United States Court of Appeals
For the First Circuit

No. 74-1137.

UNITED STATES OF AMERICA,
APPELLEE,

v.

FRANCIS A. VITELLO,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge,*
CAMPBELL, *Circuit Judge,* and
MOORE,* *Senior Circuit Judge.*

* Of the Second Circuit sitting by designation.

Harvey R. Peters, with whom *Paul T. Smith* and *Jeffrey M. Smith*, were on brief, for appellant.

Charles J. Alexander, Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *James N. Gabriel*, United States Attorney, *Gilbert E. Andrews*, and *Crombie J. D. Garrett*, Attorneys, Tax Division, Department of Justice, were on brief, for appellee.

December 26, 1974

MOORE, *Senior Circuit Judge:* Defendant-Appellant Francis A. Vitello, appeals from a judgment entered upon a jury verdict of guilty of (1) conspiring to defraud the United States in the collection of income taxes by wilfully

subscribing false income tax returns for 1966 and 1967 (18 U.S.C. Section 371 and 26 U.S.C. Section 7206 (1); (2) and (3) wilfully subscribing to false returns for 1966 and 1967 respectively. He was sentenced to three years on each count to be served concurrently and fined $10,000.00 on Count one, $5,000.00 on Count two and $5,000.00 on Count three. Three unindicted co-conspirators, Francis N. Rosenbaum, John W. Harris and Walter A. Lips, played important roles in the tax scheme as charged by the Government.

More specifically, Count I charged Vitello with conspiring with Rosenbaum, Harris and Lips to file false returns for 1966 and 1967 and alleged thirteen overt acts, which may be summarized as follows: Vitello, Harris and a Frank L. Harney on or before June, 1961 conferred in Massachusetts and Vitello and Harris conferred with an attorney, Douglas Mode, in Washington, D. C. Arrangements were made for a meeting in Switzerland with Rosenbaum, a Washington attorney, and Lips, a Swiss banker. Thereafter Lips and Rosenbaum prepared for Vitello schedules showing fictitious security transactions for use in Vitello's income tax returns. These schedules Vitello attached to his returns, subscribed the returns and caused them to be filed with the Internal Revenue Service.

Count II charged Vitello with filing a 1966 return false in that he reported $305,372.00 as long-term capital gains, attaching a lengthy schedule showing specific transactions, whereas he knew that he and his wife had no such gains.

Count III is similar to Count II except the year is 1967 and the gain $504,758.52.

The question immediately comes to mind: why would anyone voluntarily wish to pay a capital gains tax on $810,130.52 when no such gain had been realized? The answer is to be found in the rather curious stories told by the conspirators of their efforts on behalf of Vitello to

"legitimatize" a large amount of unreported income which Vitello had on deposit in a Swiss bank.

The conspiracy apparently began in 1953 when Vitello met his friend of some 35 years, John W. Harris, then a revenue officer in the Internal Revenue Service (IRS). Vitello told Harris that he had unreported income on which he wished to pay the tax and avoid a possible criminal prosecution. In other words, if there were a net worth investigation, Vitello wanted the unreported income to appear to have been legitimately earned. Harris offered to consider the question and approached the problem by asking another revenue agent whether he knew anyone who had any knowledge regarding investing in overseas stocks. This agent gave Harris the name of Francis Harney, who for a monetary consideration, agreed to, and did, go to Washington to investigate voluntary disclosure.

Upon his return Harney reported adversely on voluntary disclosure but supplied a link in the chain with the name of Douglas Mode, a Washington attorney reportedly knowledgeable about foreign investments. A meeting between Vitello, Mode and Harris ensued at which time Mode offered to meet Vitlelo in Switzerland in June of 1961 where he would introduce Vitello to a friend. Prior thereto, in November, 1960, Vitello and Harris had gone to Zurich where Vitello deposited funds with the Union Bank of Switzerland.

Through Mode other co-conspirators entered the picture. Rosenbaum, a Washington tax lawyer and a partner in the firm with which Mode had office space, at Mode's request, telephoned his friend Lips, an officer of the Union National Bank in Switzerland.

As pre-arranged, all met in Zurich in June, 1961, namely, Vitello, Mode, Harris, Lips and a Dr. Burgert, a Swiss who owned several companies and was a customer of Lips. Rosenbaum and Lips then proceeded to concoct a scheme

whereby fictitious gains could be reported. However, there had to be some monetary base as a foundation for gains, referred to as "seed money." This Vitello supplied via Mode to Dr. Burgert in the amount of $105,000.

At this stage, were the situation not so serious, it began to assume somewhat comic aspects—at least presenting a situation worthy of a Perry Mason or Sherlock Holmes.

Rosenbaum needed $600,000.00 because he had taken and lost this amount of client funds. To obtain this sum, Rosenbaum persuaded the Panamanian Ambassador to England, Anthony Morales, to pretend he was Vitello and to open an account in Vitello's name at the International Credit Bank. Through a series of forgeries of Vitello's name, Rosenbaum extracted $857,471.22 of Vitello's funds from Vitello's depository bank and placed them in Vitello's name at the International Credit Bank. Thus when a large amount had been conveniently collected, Ambassador Morales, posing as Vitello, withdrew $700,000.00 which he turned over to Rosenbaum, presumably restoring him to the good grace of his previously robbed client.

This robbery of Peter to pay Paul was soon discovered. Upon learning of the theft, Vitello decided he had had enough misfortune in Switzerland and withdrew his remaining $359,000 from the Union Bank and deposited it where it was within his control, namely, in his checking account at the First National Bank of Boston. Vitello's next move was to find the culprit. This presented few difficulties. An investigator solved the theft. Rosenbaum confessed and promised to repay—and did, receiving a release from Vitello on June 7, 1965.

Vitello's troubles had not ended. A lawsuit brought against Vitello by the investigator was settled. And there was the fee of Vitello's attorney, but Rosenbaum balked at paying more than $21,500.00 towards these items. However, Rosenbaum did agree to prepare the necessary papers

to repatriate and legitimatize Vitello's funds. This Rosenbaum and Lips did by drawing up schedules showing fictitious purchase and sales of foreign stocks and resultant capital gains of $305,372.00 for 1966 and $504,758.72 by means of fictitious short sales for 1967. Schedules reporting these fictitious transactions were signed and filed by Vitello and made a part of his returns for the respective years.

From this somewhat lengthy recital of the facts, it is evident that much of the story was developed through conversations between the co-conspirators at which time Vitello was not present. The trial court admitted this testimony "subject to the Government's obligation * * * to prove independently of this conversation that the participants * * * were members of the conspiracy." The court made a special point of instructing the jury regarding this obligation. And when defense counsel, whose comments were invited, asked the court to "instruct them that it would not be admissible against the defendant until and unless they find that he is a part of that conspiracy", it did so, charging that for the conversation to be admissible, the witnesses would have to be "part of the same conspiracy with which the defendant is charged in this case."

Vitello now argues as his first appellate point that the trial court admitted "* * * INTO EVIDENCE HIGHLY PREJUDICIAL HEARSAY DECLARATIONS OF DEFENDANT'S ALLEGED CO-CONSPIRATORS WITHOUT PROPER LIMITING INSTRUCTIONS." (Appellant's Br. p. 10).

In so arguing, appellant relies on *United States* v. *Apollo*, 476 F.2d 156, 163 (5th Cir. 1973), in which the court held that in a conspiracy case in which co-conspirators' hearsay declarations are offered, the court must explain "clearly to the jury the requirement that the conspiracy itself and

each defendant's participation in it must be established by independent evidence." The *Apollo* court required the instruction "to be given either prior to the introduction of any evidence or immediately upon the first instance of such hearsay testimony." In the present case, a full and correct instruction was given later, prior to submission of the case to the jury, and the earlier instruction, while incomplete, was correct so far as it went and was consistent with defense counsel's immediate requests. In no case has this circuit reversed for failure to give a complete cautionary instruction early in the trial, and here we are satisfied that there was ample independent evidence tying the defendant into the conspiracy. We thus do not find reversible error. We would emphasize, however, the desirability that trial judges give a full and precise limiting instruction early in the trial. The *Apollo* procedure should be followed, and failure to do so could, in appropriate cases, result in reversal. *See United States* v. *Honneus*, slip op. No. 74-1112 (1st Circuit, Dec. 24, 1974).

The previous recital of the facts is sufficient to dispose of Vitello's insufficiency of evidence point.

Lastly, Vitello ascribes error to the court's refusing to permit an adverse inference to be drawn from the government's failure to call Lips. Lips is a Swiss national, allegedly residing in Lugano, Switzerland. He is beyond the subpoena power of either Vitello or the government. *United States* v. *Johnson*, 467 F.2d 804 (1st Cir. 1972), is in no manner applicable. There the witness was in Massachusetts (albeit in jail) and equally available to both sides. The court quite properly under the law and the facts excluded the "missing witness" argument.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-915

FRANCIS A. VITELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole issue raised by the petition is whether the admission of statements of a co-conspirator who did not testify at trial violated petitioner's right to confront witnesses.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on all counts of a three-count indictment charging him with (1) conspiracy to defraud the United States by impeding and obstructing the Internal Revenue Service in the ascertainment and collection of income taxes, in violation of 18 U.S.C. 371, and (2) willfully subscribing, under penalties of perjury, to individual income tax returns for 1966 and 1967 that he did not believe to be true and correct, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to concurrent three-year prison terms on

each of the three counts, and he was fined $10,000 on the conspiracy count and $5,000 on each substantive count (II-R. 1278-1279).[1] The court of appeals affirmed (Pet. App. B).

The proof showed that, in pursuance of the conspiracy, petitioner transmitted more than $1,000,000 to Switzerland for deposit in a Swiss bank account. Thereafter, petitioner falsely attributed the funds on his 1966 and 1967 income tax returns to long-term capital gains resulting from the purchase and sale of foreign securities. These reported capital gains were entirely fictitious (Gov't Exs. 5, 6).

The details of petitioner's transfer of funds, as summarized by the court of appeals (Pet. App. B 19-22), were as follows: Petitioner was an old friend of unindicted coconspirator John W. Harris, a former special agent of the Internal Revenue Service (I-R. 333, 337-339). Petitioner advised Harris that he had substantial amounts of unreported income on which he wanted to pay tax in order to make certain that he would not be involved in a criminal prosecution (I-R. 351-352; II-R. 612). Petitioner wanted to "bring out" or legitimatize the money so as to be able to show it in his net worth (I-R. 352-353). Harris then asked a revenue officer whether he knew anyone who had any knowledge of investing in overseas stocks (II-R. 1180, 1183-1190). The revenue officer gave Harris the name of Francis Harney, who furnished the name of Douglas Mode, a Washington attorney who had knowledge about foreign investments (I-R. 364-365, 425, 433-438).

A meeting among petitioner, Mode and Harris ensued, at which time Mode offered to meet petitioner in Switzerland, where he would introduce him to a friend. Petitioner

[1] "I-R." and "II-R." refer to the two-volume appendix filed in the court of appeals.

and Harris subsequently went to Zurich, where petitioner deposited funds with a Swiss bank (I-R. 157-162, 181-182, 225, 340-348, 451-460, 466, 478; Gov't Exs. 19, 21). At Mode's request, Francis N. Rosenbaum, a Washington lawyer and a partner in the firm with which Mode had office space, telephoned his friend Walter A. Lips, an officer of the Swiss bank (I-R. 500-507, 509-512; II-R. 814, 819, 823-824, 1060-1063). Rosenbaum and Lips were both named as unindicted co-conspirators.

A meeting was held in Zurich involving petitioner, Mode, Harris, Lips, and a Dr. Burgert, a Swiss national who owned several companies and was a customer of Lips. Rosenbaum and Lips then developed a scheme whereby petitioner could report fictitious capital gains (I-R. 169-174, 448-450; II-R. 826-828, 832-834, 1028-1029, 1096-1097, 1123). They studied the prices at which European stocks had been selling and, by selecting stocks that had gone up, they drew up a schedule for petitioner's 1966 return reflecting fictitious purchases and sales of foreign stocks and a nonexistent long-term capital gain of $305,372 (II-R. 971-977; Gov't Ex. 5, pp. 9-13). Rosenbaum and Lips selected a French stock that had declined in value in 1967, and computed fictitious short sales of this stock for petitioner to report on his 1967 return. As a result, petitioner reported a nonexistent capital gain of $504,758.72 on his 1967 return (II-R. 979-986; Gov't Ex. 6, pp. 6-8).

1. Petitioner argues (Pet. 11-16) that the admission of the statements of Lips, describing the plan for petitioner to report the fictitious sales of stock, through the testimony of Rosenbaum violated his right to confront the witnesses against him because Lips was not available to testify at trial. However, the witness against petitioner was not Lips but Rosenbaum, and petitioner had every opportunity to confront him. Had the declarations of Lips been made after the conspiracy had terminated, they could have

been admitted only against Lips. See, *e.g.*, *Lutwak* v. *United States*, 344 U.S. 604; *Bruton* v. *United States*, 391 U.S. 123; and *Krulewitch* v. *United States*, 336 U.S. 440. But the statements of Lips to which Rosenbaum testified were made during the existence of the conspiracy and in furtherance of one or more of the principal objectives of the conspiracy. As a result, those declarations were properly admissible against petitioner even though he was not present at the time they were made, provided that there was independent evidence to establish that petitioner was a part of the conspiracy. *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 16; *Fiswick* v. *United States*, 329 U.S. 211, 217; *Logan* v. *United States*, 144 U.S. 263, 308-309; see *Lutwak* v. *United States*, *supra*, 344 U.S. at 617-618; *United States* v. *Apollo*, 476 F.2d 156 (C.A. 5); *United States* v. *Honneus*, 508 F.2d 566 (C.A. 1).

It is beyond question that there was independent evidence of the existence of the conspiracy. The conspiracy began with petitioner's admission to his friend Harris that he had unreported income and that he wanted to pay the tax on that income to insure that he would not be involved in a criminal prosecution (I-R. 351-352). Petitioner also told Harris that he wanted to "bring out" the money so as to be able to show it in his net worth, and he asked Harris to find out how that might be possible (I-R. 352-353). From the evidence, the jury could have found that petitioner was engaged in a conspiracy to obstruct the lawful functions of the Internal Revenue Service by transmitting unreported income to Switzerland, where it would be beyond the scrutiny of the Internal Revenue Service. The evidence further showed petitioner's receipt of false schedules of capital gains and his

attachment of them to his income tax returns for 1966 and 1967. The conspiracy thus came full circle with petitioner initiating, participating in, and carrying to conclusion the conspiracy that existed for his benefit. There was accordingly ample evidence independent of Lips' statements to support the existence of a conspiracy.

2. Petitioner further argues (Pet. 12, 15-16) that even if the statements of Lips were admissible through the testimony of Rosenbaum, the trial judge erred in not giving the jury a limiting instruction that such statements could only be considered if it found that petitioner was part of the conspiracy between Lips and Rosenbaum. Citing *United States* v. *Apollo*, *supra*, petitioner objects to the trial judge's statement to the jury prior to Rosenbaum's testimony that the statements "would be admissible if it is found that they [Rosenbaum and Lips] are part—that not only is there conspiracy between them, but they are part of the same conspiracy with which the defendant is charged in this case" (Pet. 8, 12). Petitioner claims that the trial judge's statement did not inform the jury that Rosenbaum's testimony could only be considered if it found that petitioner was part of the conspiracy.

Contrary to petitioner's contention, the trial judge's statement fairly advised the jury that Rosenbaum's testimony could only be considered if there was independent evidence that Lips and Rosenbaum joined with petitioner in the conspiracy. But at all events, as the court of appeals pointed out, "a full and correct instruction was given later, prior to submission of the case to the jury, and the earlier instruction, while incomplete, was correct so far as it went and was consistent with defense counsel's immediate requests" (Pet. App. B 23). (See II-R. 1264.)

While the Fifth Circuit in *Apollo* required the instruction to "be given either prior to the introduction of any evidence or immediately upon the first instance of such hear-

say testimony" (476 F.2d at 163), there the trial judge not only refused to give any instruction contemporaneous with the testimony, but also stated in the presence of the jury that the "connection with conspiracy must of necessity be established by some hearsay in this kind of case" (*ibid.*). Here, however, where the trial judge's earlier instruction largely complied with the *Apollo* test, and there was ample independent evidence connecting petitioner with the conspiracy, the court of appeals correctly concluded that there was no reversible error.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.